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WILL THEY KNOW IT WHEN THEY SEE IT? THE SEARCH FOR A WORKABLE DEFINITION OF AGGRESSION AT THE INTERNATIONAL CRIMINAL COURT

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War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[1]

It would be theoretically desirable to set down in writing, if it could be done, an exact definition of what constitutes an act of aggression. If such a definition could be drawn up, it would then merely remain for the Council to decide in each given case whether an act of aggression within the meaning of this definition had been committed. It appears, however, to be exceedingly difficult to draw out any such definition. In the words of the Permanent Advisory Commission, under the conditions of modern warfare, it would seem impossible to decide even in theory what constitutes an act of aggression.[2]

I. Introduction

Since almost the beginning of recorded history, there have been individuals who recognized the danger of aggressive wars and the tremendous cost they inflicted on the world as a whole. Yet for centuries aggressive warfare was an accepted manner of conduct for States.[3] It was only as the weapons of war became increasingly sophisticated and able to inflict complete devastation on both combatants and noncombatants that scholars,

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[1] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 115 (1988) (quoting Lord Wright, *War Crimes Under International Law*, 62 LAW Q. REV. 40, 47 (1946)).

[2] 1 BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION 81 (1975) [hereinafter 1 FERENCZ, DEFINING AGGRESSION].

[3] DINSTEIN, *supra* note 1, at 72; GEOFFREY BEST, HUMANITY IN WARFARE 20 (1980).

philosophers, and diplomats began to work in earnest to devise a system for the peaceful resolution of disputes between States.[4]

The first real efforts to create a new world order that would prohibit aggressive wars can be traced to the years before World War I. But it was only after the world witnessed the catastrophe inflicted on Europe during World War I that momentum began to build toward a workable system that might truly prevent another world war.[5] As recognition of the danger of aggressive warfare grew, people began to understand that aggressive wars were inevitably initiated not by the citizens of a State, but by the State leader or a small group of senior government officials.[6] The search for a definition of aggression, therefore, diverged. Attempts to define aggression for political purposes with respect to State interaction continued while a new effort to define the crime of aggression began.[7]

Throughout history numerous attempts have been made to develop a generally accepted definition of aggression.[8] Participants attempting to draft a definition found the undertaking to be surprisingly difficult.[9]

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[4] BEST, *supra* note 3, at 20.

[5] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 6.

[6] *See* Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 28 (1995).

[7] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 40; DINSTEIN, *supra* note 1, at 112.

[8] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 1.

[9] *See* Special Committee of the Temporary Mixed Commission, *Commentary on the Definition of a Case of Aggression*, LEAGUE OF NATIONS O.J. Spec. Supp. 16, at 185 (1923).

Although each successive attempt has failed in some respect, their collective history has served to highlight the basic concerns that any successful definition must address. These include the appropriate role of any international political body (first the League of Nations and the Permanent Court of International Justice, now the United Nations and perhaps the International Criminal Court), the tension between the liability of the State and the liability of individual State leaders, the relative importance of the parties' intent and how to determine that intent, and the appropriate balance between the right of self-defense and State sovereignty. The proper structure of the definition itself has also been contentious. Opinions have differed regarding the relative value of a general definition, a specific definition with or without examples, and a composite of the two types of definition.[10]

Constructing a universally acceptable definition of aggression may well be impossible. Scholars and diplomats are still struggling today to define aggression in a manner that will be acceptable even to a majority of States. This paper will track those attempts and, in particular, the efforts to criminalize the instigation of an aggressive war. This paper will also focus on the concerns of the United States regarding the definition of the crime of aggression currently pending before the International Criminal Court; and will attempt to develop a definition that will address the American concerns in a manner that will be acceptable to other members of the International Criminal Court.

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[10] *See* 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 12.

II. Historical Development of the Definition of Aggression

A. Pre-World War I

1. Development Prior to the Twentieth Century

> *International war was pretty generally regarded as the most natural and proper of such harnessings, positively beneficial from some nations' standpoints, until well on this side of 1914.*[11]

For centuries aggressive warfare was an accepted method of State interaction. Yet even during man's earliest civilizations, various enlightened philosophers recognized the danger aggressive warfare represented. Mo Ti, a Chinese philosopher, was perhaps the first to argue that aggressive warfare should be abandoned.[12]

In the sixteenth century a number of scholars spoke out against aggressive warfare. Francisco de Victoria declared that war was justified "only to right a wrong" and that aggressors should be forced to compensate their victims.[13] Balthazar Ayala argued that wars were only legitimate if fought in self-defense. Alberico Gentili believed wars should be

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[11] BEST, *supra* note 3, at 20.

[12] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 4.

[13] THE NUREMBERG TRIAL AND INTERNATIONAL LAW 121-22 (George Ginsburgs & V.N. Kudriavtsev eds., 1990) [hereinafter THE NUREMBERG TRIAL].

limited to those with a "just cause."[14] Hugo Grotius argued that only wars in self-defense were justified.[15]

It was not until the 18th century, however, that civilization as a whole began to increasingly feel the burden of aggressive warfare. William Penn, years a head of his time, proposed an international "sovereign court" that would deal peacefully with disputes between States. All the other nations would unite against any State that refused to submit its dispute to the court or that refused to accept the court's decision.[16]

Others followed with their own theories. Philosophers such as Rousseau, Kant, Bentham, and Ladd all pushed their own proposals for a means of settling disputes between States without resorting to war. Invariably these proposals included some type of international political body that would arbitrate the disputes, often in conjunction with a mutual defense treaty.[17] By the end of the 19th century even Russia was finding the prevailing system too burdensome. Unable to afford the arms race created by the military buildup in France and Germany, the czar of Russia convened the First Hague Peace Conference of Twenty-six

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[14] *Id.* Gentili felt war was justified only if for a just cause, which did not include religious fervor. He was perfectly willing to approve of the use of armed force against those who by their actions put themselves outside the law, such as brigands, pirates, and kings who waged war without a just cause. *Id.*

[15] *Id.* at 122. According to Grotius, "If an attack by violence is made on one's person, endangering life, and no other way of escape is open, under such circumstances war is permissible, even though it involves the slaying of the assailant." *Id.*

[16] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 5; THE NUREMBERG TRIAL, *supra* note 13, at 122.

[17] THE NUREMBERG TRIAL, *supra* note 13, at 122-23; 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 5.

States for the Friendly Settlement of International Disputes. The conference failed to produce any substantive results, but it did serve as the basis for later Geneva Conventions.[18]

2. The League of Nations

The idea of a League of Nations had already surfaced in the years before World War I. Unfortunately World War I began before enough support could be galvanized to make any real progress toward establishing such an organization.[19] The devastation of World War I was sufficient to renew the call for a League of Nations and President Woodrow Wilson became its chief proponent. President Wilson felt the League of Nations would "guarantee peace and justice throughout the world."[20] France, England, Italy, the United States, and Japan convened the Paris Peace Conference in Versailles at the end of World War I to consider how to assess responsibility for the war and how to prevent the next world war.[21]

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[18] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 5. The conference was held at The Hague and included representatives from twenty-six States. It was recognized as "the first truly international assembl[y] meeting in time of peace for the purpose of preserving peace." Unfortunately, no institution existed at that time to which States could turn to arbitrate disputes. *Id.* at 7.

[19] *Id.* at 6-7.

[20] *Id. See also* THE NUREMBERG TRIAL, *supra* note 13, at 125-26; 1 BENJAMIN J. FERENCZ, AN INTERNATIONAL CRIMINAL COURT 26-27 (1980) [hereinafter 1 FERENCZ, AN INTERNATIONAL CRIMINAL COURT]. In his address to a joint session of Congress on January 8, 1918, President Wilson set out his fourteen points for the resolution of World War I in a manner that would guarantee the world would "be made safe for every peace-loving nation" and provide "justice and fair dealing by the other peoples of the world as against force and selfish aggression." His fourteenth point was a recommendation that "[a] general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike." President Woodrow Wilson, Address Before a Joint Session of Congress (Jan. 8, 1918) (on file with the author), *available at* http://www.lib.byu.edu/~rdh/wwi/1918/14points.html.

[21] 1 FERENCZ, AN INTERNATIONAL CRIMINAL COURT, *supra* note 20, at 26.

President Wilson was given the chairmanship of the committee to draft a Covenant for the new League of Nations.[22] It was adopted on April 28, 1919.[23]

3. The Prosecution of Kaiser Wilhelm II

One of the strongest reactions to the end of World War I was, naturally enough, a call to punish those who had started it. The British were the first to respond when they established their own Committee of Inquiry into the Breaches of the Laws of War in December 1918. The committee's recommendation was that "an international tribunal should be established ... for the trial and punishment of the ex-Kaiser as well as other offenders against the laws and customs of war and the laws of humanity."[24]

The Paris Peace Conference addressed this recommendation by establishing a Commission on Responsibility to determine "the responsibility of the authors of the war." The Commission concluded "responsibility for the war rested primarily upon Germany and Austria." It also divided the offenses they proposed to prosecute into those that precipitated the war and those that occurred during the war.[25]

Much discussion ensued regarding the difficulty of determining the actual cause of the war, the legality and practicality of setting up an international court to try the cases versus

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[22] LEAGUE OF NATIONS COVENANT

[23] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 6-7.

[24] 1 FERENCZ, AN INTERNATIONAL CRIMINAL COURT, *supra* note 20, at 25.

[25] *Id.* at 27-28.

leaving the prosecutions to the national courts of the victors, and the American distaste of prosecuting crimes, such as aggression, that had never before existed or been prosecuted.[26] Despite these misgivings, Wilhelm II, the German Kaiser, was charged in Article 227 of the Treaty of Versailles with an offense against international morality for his part in initiating World War I.[27] The Kaiser was in reality being charged with the as yet undefined crime of initiating an aggressive war.[28] In fact the charge as drafted was so vague, perhaps intentionally so, that had he actually been tried he would almost certainly have been acquitted "based on the fact that his conviction would violate the principles of legality."[29]

Germany did sign the Treaty of Versailles, but then quickly announced it would not be bound by the terms of Article 227.[30] The Kaiser resolved all doubt by seeking asylum in the

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[26] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 28-29.

[27] Articles 228 and 229 of the Versailles Treaty charged almost 20,000 individuals with war crimes. This number was unmanageable, and support among the Allies to establish an international tribunal was not wholehearted. The compromise was to allow the German Supreme Court to prosecute the individuals under German law. Subsequently, the Allies were surprised to learn that under German law the prosecutor has complete discretion with regard to initiating criminal cases and without intervention there would likely be no trials at all. Negotiations between Germany and the Allies resumed and resulted in forty-five individuals being charged. Of these, only twenty-three actually went to trial. Most of these involved German submarines that sank two British hospital ships and then shot the survivors on the surface. In the end, only twelve officers were convicted and the stiffest punishment was imprisonment for three years (the individual only served six months). The Allies would not repeat this mistake after World War II. M. Cherif Bassiouni, *The International Criminal Court in Historical Context*, 1999 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 55, 57-60 (1999) [hereinafter Bassiouni, *The International Criminal Court*].

[28] 1 FERENCZ, AN INTERNATIONAL CRIMINAL COURT, *supra* note 20, at 29-31.

[29] Bassiouni, *The International Criminal Court*, *supra* note 27, at 55, 58. Bassiouni contends the Allies never really intended to prosecute the Kaiser. He believes the text of Article 227 was purposely drafted with ambiguous language to ensure an acquittal if a prosecution was ever attempted. *Id.*

[30] 1 FERENCZ, AN INTERNATIONAL CRIMINAL COURT, *supra* note 20, at 30.

Netherlands, which was not a party to the Treaty of Versailles.[31] The King of the Netherlands, who happened to be the Kaiser's cousin, refused to extradite him.[32]

4. The Covenant of the League of Nations

The Covenant of the League of Nations "did not abolish the right of states to resort to war." It instead attempted to provide a peaceful means to settle disputes and in fact functioned more as a mutual defense treaty.[33] Article 10 of the Covenant, an obvious precursor to Article 2(4) of the Charter of the United Nations, addressed wars of aggression. It stated:

> The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.[34]

It defined an aggressive war in terms of a war against the territorial integrity and existing political independence of a nation.[35] Not only was this definition vague, but the Covenant as a whole left numerous "gaps" through which almost any use of force could be justified.[36]

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[31] DINSTEIN, *supra* note 1, at 112.

[32] Bassiouni, *The International Criminal Court*, *supra* note 27, at 55, 58.

[33] DINSTEIN, *supra* note 1, at 75-76.

[34] LEAGUE OF NATIONS COVENANT art. 10.

[35] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 8.

[36] DINSTEIN, *supra* note 1, at 78-80.

Any real hope that the League of Nations would be powerful enough to stop aggression ended when President Wilson was unable to win ratification of the treaty in the United States.[37]

5. The Treaty of Mutual Assistance

Despite the absence of the United States, the other major powers attempted to continue on with the League of Nations.[38] Particularly noteworthy was their attempt to establish the Treaty of Mutual Assistance.[39] Article 1 of the Treaty declared, "[A]ggressive war is an international crime." It defined aggressive war in the negative by describing what was considered not to be aggressive warfare.[40]

> A war shall not be considered as a war of aggression if waged by a State which is party to a dispute and has accepted the unanimous recommendation of the Council, the verdict of the Permanent Court of International Justice, or an arbitral award against a High Contracting Party which has not accepted it, provided, however, that the first State does not intend to violate the political independence or the territorial integrity of the High Contracting Party.[41]

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[37] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 8. Ratification of the treaty required a two-thirds majority in the Senate. In March 1920, the issue came up for a vote. Although a majority of the Senators voted in favor of the League of Nations, they were unable to garner the necessary two-thirds. A few isolationist Senators were able to muster enough support to block ratification. 1 FERENCZ, AN INTERNATIONAL CRIMINAL COURT, *supra* note 20, at 34-35.

[38] *Id.* at 35.

[39] Draft Treaty of Mutual Assistance, LEAGUE OF NATIONS O.J. Spec. Supp. 16, at 203 (1923).

[40] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 10-11.

[41] Draft Treaty of Mutual Assistance, *supra* note 39.

The committee working on the Treaty of Mutual Assistance considered and disregarded a definition of aggression that would set out specific acts that constitute aggression, such as a mobilization or the violation of a frontier. The Committee also wrestled with the question of intent.[42] While acknowledging the difficulty of determining a State's intent, the committee did note that:

> [T]he signs of an intention of aggression would appear in the following order: (1) Organization on paper of industrial mobilization; (2) Actual organization of industrial mobilization; (3) Collection of stocks of raw materials; (4) Setting on foot of war industries; (5) Preparation for military mobilization; (6) Actual military mobilization; (7) Hostilities.[43]

The committee concluded that it could not devise a simple definition of aggression.[44] Therefore, it left it up to the discretion of the Council of the League of Nations to determine when aggression had occurred while stating the following:

> It is clear, therefore, that no simple definition of aggression can be drawn up, and that no simple test of when an act of aggression has actually taken place can be devised. It is therefore clearly necessary to leave the Council complete discretion in the matter, merely indicating that the various factors mentioned above may provide the elements of a just decision. These factors may be summarized as follows: (a) Actual industrial and economic mobilization carried out by a State either in its own territory or by persons or societies on foreign territory; (b) Secret military mobilizations by the formation and employment of irregular troops or by declaration of a state of danger of war which would serve as a pretext for commencing hostilities; (c) Air, chemical or naval attack carried out by one party against another; (d) The presence of

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[42] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 11.

[43] Special Committee of the Temporary Mixed Commission, *Commentary on the Definition of a Case of Aggression*, LEAGUE OF NATIONS O.J. Spec. Supp. 16, at 183 (1923).

[44] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 12.

> the armed forces of one party in the territory of another; (e) Refusal of either of the parties to withdraw their armed forces behind a line or lines indicated by the Council; (f) A definitely aggressive policy by one of the parties towards the other, and the consequent refusal of the party to submit the subject in dispute to the recommendation of the Council or to the decision of the Permanent Court of International Justice and to accept the recommendation or decision when given.[45]

This proposal was submitted to all nations, even those who were not members of the League of Nations. It was quickly opposed by the United States, England, Russia, and Germany, and died for lack of "some clear criteria to make it possible to decide which of two warring states was the aggressor." Consequently it was never adopted.[46]

6. The American Plan

A group of Americans then took up the challenge of drafting a treaty that would address the "gaps" in the Covenant of the League of Nations with respect to aggression.[47] The American Plan began by designating aggressive war "an international crime."[48] The American Plan essentially functioned as a mutual defense treaty wherein treaty members agreed not to use aggressive force, and to sanction those who did through force or economic

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[45] Special Committee of the Temporary Mixed Commission, *supra* note 43, at 185.

[46] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 14.

[47] DINSTEIN, *supra* note 1, at 113.

[48] Draft Treaty of Disarmament and Security Prepared by an American Group, LEAGUE OF NATIONS O.J. Spec. Supp. 26, at 124 (1924).

means. It left the decision of whether there had been aggression to the Permanent Court of International Justice rather than the Council of the League of Nations.[49]

The American plan was "never accepted or even seriously considered." However, it subsequently became the basis for the 1924 Geneva Protocol on the Pacific Settlement of International Disputes.[50]

7. The 1924 Protocol for the Pacific Settlement of International Disputes

The British and the French were the next group to attempt to draft an acceptable treaty regarding aggressive warfare when they proposed the Protocol for the Pacific Settlement of International Disputes.[51] Their approach was to "combine various elements from the aborted Treaty of Mutual Assistance and the American proposal" into what they called a "system of arbitration, security and reduction of armaments."[52]

Previous treaties and proposals had attempted to restrict the right of a State to conduct an aggressive war but had not eliminated it. This Protocol sought to do just that—to totally

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[49] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 14. The United States has always sought to exert as much control over this area as possible. Thus, it was not surprising that the United States chose the International Court of Justice to be the arbiter of aggression. The United States was, after all, not a member of the League of Nations. Eighty years later the United States is now steadfast in its objection to giving the International Criminal Court the authority to determine the occurrence of aggression. It instead insists that the Security Council, of which it is a permanent member with the accompanying right of absolute veto, is the only proper forum for a determination of aggression. *See Id.*

[50] *Id.* at 14.

[51] Protocol for the Pacific Settlement of International Disputes, LEAGUE OF NATIONS O.J. Spec. Supp. 26, at 189 (1924).

[52] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 14-15.

eliminate the right of a State to conduct an aggressive war.[53] The discussion section regarding Article 2 of the Protocol began by announcing a "prohibition of aggressive war." The discussion further provided:

> In no case is any State signatory of the Protocol entitled to undertake on its own sole initiative an offensive war against another signatory State or against any non-signatory State which accepts all the obligations assumed by the signatories under the protocol. The prohibition affects only aggressive war. It does not, of course, extend to defensive war. The right of legitimate self-defence continues, as it must, to be respected. The State attacked retains complete liberty to resist by all means in its power any acts of aggression of which it may be the victim. Without waiting for the assistance which it is entitled to receive from the international community, it may and should at once defend itself with its own force.[54]

In the discussion regarding Article 10 of the Protocol the committee addressed its plan to identify aggression. In pertinent part, the discussion provided:

> This question is a very complex one, and in the earlier work of the League the military experts and jurists who had had to deal with it found it extremely difficult. There are two aspects to the problem: first, aggression has to be defined, and, secondly, its existence has to be ascertained. The definition of aggression is a relatively easy matter, for it is sufficient to say that any State is the aggressor which resorts in any shape or form to force in violation of the engagements contracted by it either under the Covenant (if, for instance, being a Member of the League of Nations, it has not respected the territorial integrity or political independence of another Member of the League) or under the present Protocol (if, for instance, being a signatory of the Protocol, it has refused to conform to an arbitral award or to a unanimous decision of the Council). This is the effect of Article 10, which also adds that the violation of the rules laid down for a demilitarized zone is to be regarded as equivalent to resort to war. The text refers to resort to war, but it was understood during the

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[53] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 15.

[54] Work of the First Committee, *Draft Protocol for the Pacific Settlement of International Disputes*, LEAGUE OF NATIONS O.J. Spec. Supp. 26, at 198 (1924).

> discussion that, while mention was made of the most serious and striking instance, it was in accordance with the spirit of the Protocol that acts of violence and force, which possibly may not constitute an actual state of war, should nevertheless be taken into consideration by the Council. On the contrary, to ascertain the existence of aggression is a very difficult matter, for although the first of the two elements which together constitute aggression, namely, the violation of an engagement, is easy to verify, the second, namely, resort to force, is not an easy matter to ascertain. When one country attacks another, the latter necessarily defends itself, and when hostilities are in progress on both sides, the question arises which party began them.[55]

In an effort to make it easier to determine when aggression had occurred, the committee proposed that a presumption of aggression be utilized that would arise in three cases. Aggression would be presumed:

> When a resort to war is accompanied: By a refusal to accept the procedure of pacific settlement or to submit to the decision resulting therefrom; By a violation of provisional measures enjoined by the Council as contemplated by Article 7 of the Protocol; Or by disregard of a decision recognising that the dispute arises out of a matter which lies exclusively within the domestic jurisdiction of the other party and by failure or by refusal to submit the question first to the Council or the Assembly.[56]

"The Protocol was adopted unanimously, but by its terms it was to come into effect only upon ratification by the requisite number of states and only upon the condition that the plan for the reduction of armaments went into effect."[57] France was enthusiastically in favor of the Protocol. In England, on the other hand, a conservative government had just been elected. Although Great Britain was one of the Protocol's prime architects, the new

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[55] *Id.* at 204.

[56] *Id.* at 205.

[57] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 17.

government would not support it, and it quickly died in the same manner as all the earlier proposals.[58]

8. The Committee on Arbitration and Security

In 1927, the Assembly of the League of Nations again entered the fray. It resolved "[t]hat all wars of aggression are, and always shall be, prohibited."[59] One of the Assembly's committees, the Committee on Arbitration and Security, began to study the definition of aggression. The Committee was unable to accomplish much more than a report that compiled the definitions of aggression from previous attempts.[60] The committee did, however, conclude the following:

> [T]hat certain acts would in many cases constitute acts of aggression; for instance:
> (1) The invasion of the territory of one State by the troops of another State;
> (2) An attack on a considerable scale launched by one State on the frontiers of another State;
> (3) A surprise attack by aircraft carried out by one State over the territory of another State, with the aid of poisonous gases.
>
> There are also certain factors which may serve as a basis in determining the aggressor:
> (a) Actual industrial and economic mobilization carried out by a State either in its own territory or by persons or societies on foreign territory;
> (b) Secret military mobilizations by the formation and employment of irregular troops or by declaration of a state of danger of war which would serve as a pretext for commencing hostilities;

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[58] *Id.* at 17-18.

[59] Resolutions and Recommendations Adopted on the Reports of the Third Committee, LEAGUE OF NATIONS O.J. Spec. Supp. 53, at 22 (1927).

[60] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 20.

(c) Air, chemical or naval attack carried out by one party against another;
(d) The presence of the armed forces of one party in the territory of another;
(e) Refusal of either of the parties to withdraw their armed forces behind a line or lines indicated by the Council;
(f) A definitely aggressive policy by one of the parties towards the other, and the consequent refusal of the party to submit the subject in dispute to the recommendation of the Council or to the decision of the Permanent Court of International Justice and to accept the recommendation or decision when given.[61]

9. The Kellogg-Briand Pact

In 1928, France and the United States drafted the only proposal regarding aggression that was actually ratified by most countries in the world. This proposal, the General Treaty for the Renunciation of War as an instrument of National Policy, better known as the Kellogg-Briand Pact,[62] was deceptively simple.[63] It essentially consisted of only two short and succinct articles.

> Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
>
> Article II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may

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[61] M. Rutgers, Rapporteur, *Memorandum on Articles 10, 11, and 16 of the Covenant* (1928), *reprinted in* 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 173, 174.

[62] Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, [hereinafter Kellogg-Briand Pact].

[63] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 25.

> be, which may arise among them, shall never be sought except by pacific means.[64]

The Kellogg-Briand Pact was quickly ratified by virtually every nation.[65] Now, for the first time in history, a prohibition on aggressive war was in place.[66]

At first glance the Kellogg-Briand Pact was a simple and elegant solution to the problem. However, it had several hidden flaws—the most serious one being that it failed to define either aggression or the right of self-defense.[67] This left the interpretation of these two vital principles to the individual States. Great Britain soon announced that it considered its inherent right to self-defense to extend to "all territories under British sovereignty." The United States then issued an even broader interpretation extending its right to self-defense beyond its territory to anywhere it had a vital interest. In doing so the United States and England essentially created an exception that swallowed the rule. In the end the only real effect of the Kellogg-Briand Pact was to ensure that in the future any State that used force inevitably claimed it did so in self-defense.[68]

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[64] Kellogg-Briand Pact, *supra* note 62.

[65] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 25.

[66] DINSTEIN, *supra* note 1, at 80-81. *See also* THE NUREMBERG TRIAL, *supra* note 13, at 128.

[67] DINSTEIN, *supra* note 1, at 81-83. Dinstein considered the Kellogg-Briand Pact to have moved international law from *jus ad bellum* to *jus contra bellum*. Still, he saw four particular problems with the Pact. First, it did not address self-defense. Second, it placed no limits on the use of war as an instrument of international policy. Third, not all States embraced the Pact. Finally, it also prohibited the use of force in a manner short of war. *Id.*

[68] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 25.

10. The Russian Plan

In 1933, it was the Russians who took the lead and submitted their view of a comprehensive definition of aggression to the League of Nations.[69]

> 1. The aggressor in an international conflict shall be considered that State which is the first to take any of the following actions: Declaration of war against another State; The invasion by its armed forces of the territory of another State without declaration of war; Bombarding the territory of another State by its land, naval, or air forces or knowingly attacking the naval or air forces of another State; The landing in, or introduction within the frontiers of another State of land, naval or air forces without the permission of the Government of such a State, or the infringement of the conditions of such permission, particularly as regards the duration of sojourn or extension of area; The establishment of a naval blockade of the coast or ports of another State.
>
> 2. No consideration whatsoever of a political, strategical or economic nature, including the desire to exploit natural riches or to obtain any sort of advantages or privileges on the territory of another State, no references to considerable capital investments or other special interests in a given State, or to the alleged absence of certain attributes of State organization in the case of a given country, shall be accepted as justification of aggression as defined in Clause 1. In particular, justification for attack cannot be based upon:
> A. *The internal situation in a given State*, as for instance: (a) Political, economic or cultural backwardness of a given country; (b) Alleged mal-administration; (c) Possible danger to life or property of foreign residents; (d) Revolutionary or counter-revolutionary movement, civil war, disorders or strikes; (e) The establishment or maintenance in any State of any political, economic or social order.
> B. *Any acts, laws, or regulations of a given State*, as, for instance: (a) The infringement of international agreements; (b) The infringement of the commercial, concessional or other economic rights or interests of a given State or its citizens; (c) The rupture of diplomatic or economic relations; (d) Economic or financial boycott; (e) Repudiation of debts; (f) Non-admission or limitation of immigration, or restriction of rights or privileges of foreign residents; (g) The infringement of the privileges of official representatives of other States; (h) Religious or anti-religious measures; (i) Frontier incidents.

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[69] *Id.* at 30.

> 3. In the case of the mobilization or concentration of armed forces to a considerable extent in the vicinity of its frontiers, the State which such activities threaten may have recourse to diplomatic or other means for the peaceful solution of international controversies. It may at the same time take steps of a military nature, analogous to those described above, without, however, crossing the frontier.[70]

This remarkably detailed definition garnered some support, particularly from France. The United States, Spain, Great Britain, Italy, Hungary, and Bulgaria all expressed strong objections. The proposal was returned for more study, but by then the League of Nations was already beginning to disintegrate as World War II approached. The Russian proposal was never adopted.[71] However, its codification of the "five capital sins of aggression, namely: declaration of war, invasion, armed attack, naval blockade, and support to armed bands" has continued to influence attempts to define aggression.[72]

B. Post-World War II

1. The United Nations

The devastation of World War II so eclipsed that of any previous war that there was finally near universal recognition that some means to prevent aggressive warfare was imperative. The United Nations was formed in the hope that it would succeed where the

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[70] *Definition of "Aggressor": Draft Declaration by the Delegation from the Union of Soviet Socialist Republics,* League of Nations Doc. Conf.D/C.G.38 (1933).

[71] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 33-34.

[72] Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 439 (2000).

League of Nations did not.[73] Virtually all States also recognized that two separate definitions of aggression were now needed. A political definition of aggression was needed to delineate the scope of military action the world would tolerate from a State. Another definition was needed for the criminalization of aggression.[74]

2. *The Nuremberg Trials*

> *Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.*[75]

As World War II ended, the Allies turned their attention to prosecuting those who initiated the war. The Soviet Union was the first to suggest that the Allies create an international tribunal.[76] However, despite years of attempts to outlaw aggressive war, the criminalization of aggressive war had not yet been accepted as customary international law.[77] The British, who resisted declaring aggressive warfare a crime, suggested that the war

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[73] DINSTEIN, *supra* note 1, at 115.

[74] *See* Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression?,* 19 N.Y.L. SCH. J. INT'L & COMP. L. 413, 418-19 (2000).

[75] DINSTEIN, *supra* note 1, at 115 (quoting International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, *reprinted in* 41 Am. J. Int'l L. 172, 219-23 (1947)).

[76] THE NUREMBERG TRIAL, *supra* note 13, at 132. The Soviet Union was in something of a quandary. They wanted German officials prosecuted, but because they had themselves engaged in aggression against Finland and Poland they would not support a definition of aggression that could be used against them. In the end, the Allies neatly overcame this obstacle by defining aggression in a manner that applied to all States but limiting the jurisdiction of the Nuremberg Tribunals to "the acts of aggression committed by the Axis countries." Dawson, *supra* note 74, at 423.

[77] DINSTEIN, *supra* note 1, at 116.

criminals simply be shot without a trial. The United States, on the other hand, reversed its position from World War I and argued that criminalizing aggressive warfare was necessary to align international law with "the common senses of mankind."[78]

In the end, the views of the United States won out.[79] Article 6 of the Charter of the International Military Tribunal provided in pertinent part:

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes Against Peace: namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;[80]

The Charter did not, however, attempt to define aggression. In the end the Tribunal convicted various German leaders of crimes against peace for their part in the "premeditated and unprovoked attacks and invasions of peaceful neighboring States."[81]

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[78] THE NUREMBERG TRIAL, *supra* note 13, at 132.

[79] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 41.

[80] Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544.

[81] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 41-42. Sixteen Germans were charged with a crime against peace, but only twelve were convicted. Herman Göring; Rudolph Hess, Deputy to the Fuehrer; General Keitel, Chief of the High Command; Keitel's deputy, Jodl; two top foreign policy advisors, von Neurath and von Ribbentrop; Alfred Rosenberg; and Admiral Raeder, one of the planners of the attack on Norway, were convicted of crimes against the peace. Schacht and Papen were among those acquitted. Seven of the twelve who were convicted were sentenced to hang, including Göring, von Ribbentrop, Keitel, Rosenberg, and Jodl. The remaining five were sentenced to prison sentences ranging from ten years to life. Rudolph Hess was sentenced to life in prison. THE NUREMBERG TRIAL, *supra* note 13, at 152; 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 42-43.

Justice Jackson set out his understanding of the nature of the crime of aggression in his opening address to the Court on November 21, 1945:[82]

> It is perhaps a weakness in this Charter that it fails itself to define a war of aggression. ... I suggest that an "aggressor" is generally held to be that State which is the first to commit any of the following actions:
> (1) Declaration of war upon another State;
> (2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State;
> (3) Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another State;
> (4) Provision of support to armed bands formed in the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory, all the measures in its power to deprive those bands of all assistance or protection.
>
> And I further suggest that it is the general view that no political, military, economic or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defense, that is to say, resistance to an act of aggression, or action to assist a State which has been subjected to aggression, shall not constitute a war of aggression.[83]

On December 20, 1945, the Allies issued Control Council Law No. 10 to set up tribunals outside of Nuremberg.[84] Article II of Control Council Law No. 10 defined aggression by simply paraphrasing the language of Article 6 of the Charter of the International Military Tribunal:

> Initiation of invasions of other countries and wars of aggression in violation of international law and treaties, including but not limited to planning,

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[82] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 42. Justice Jackson, the United States Chief of Counsel to the International Military Tribunal, was on leave from his position on the United States Supreme Court. *Id.*

[83] Justice Robert H. Jackson, Opening Address for the United States (Nov. 21, 1945), *reprinted in* 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 437, 446.

[84] 1 FERENCZ, DEFINING AGGRESSION, *supra* note 2, at 43.

> preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[85]

Subsequently, Article II of the Charter of the International Military Tribunal for the Far East did much the same thing by defining aggression as:

> Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[86]

Thus, the war crimes trials after World War II were conducted and in fact concluded without ever having established a detailed, universally accepted definition of aggression. There has been no subsequent attempt to prosecute anyone for the crime of aggression.[87]

3. The Charter of the United Nations

The purpose of the United Nations was to preserve international peace by preventing aggressive wars.[88] Although the Charter of the United Nations did not set out a specific

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[85] Allied Control Council Law No. 10, Dec. 20, 1945, Control Council For Germany, Official Gazette, Jan. 31, 1946, at 50.

[86] Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. 1589. Twenty-eight defendants were charged with crimes against peace and with waging a war of aggression. Most of them were "formulators of government policy" in Japan. Seven were sentenced to death and were hung. The remaining twenty-one were sentenced to long prison sentences. *Id.* at 45.

[87] Dawson, *supra* note 76, at 445.

[88] 2 BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION 1 (1975) [hereinafter 2 FERENCZ, DEFINING AGGRESSION].

definition of aggression, Article 2(4) states, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[89] Article 51 recognizes the right of self-defense, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." Article 39 of the Charter left the decision of when aggression had been committed to the sole discretion of the Security Council, without any other guidance regarding what constituted aggression.

4. Special Committee to Define Aggression

> *Everyone knew that it had been a very long time being born, and although it wasn't a very pretty baby, no one was really ready to tell the parents to try again.*[90]

The war in Korea quickly illuminated the problems the lack of a definition of aggression posed as both sides accused the other of aggression.[91] Consequently, Russia renewed its call for adoption of the definition of aggression contained in its 1933 plan. The United States, France, and Canada opposed adoption of any specific definition of aggression and noted the

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[89] U.N. CHARTER.

[90] 2 FERENCZ, DEFINING AGGRESSION, *supra* note 88, at 49.

[91] *Id.* at 4.

Russian definition failed to address "indirect aggression, such as subversion or fomenting civil strife," and land blockades.[92]

The First Special Committee on the Question of Defining Aggression was established to determine whether a definition of aggression was needed and; if so, how it was to be defined. After two years of work the committee could report only that it had been able to summarize many of the problems but was unable to resolve them.[93]

A second committee was established in 1954. This committee also produced nothing more than a study of the issues along with a recommendation that an expanded committee be appointed to continue studying the issue.[94] A third committee was established in 1959. The committee adjourned without reaching a consensus after eight years of study during which charges and counter-charges of aggression had been made over the use of force in Cyprus, Congo, Vietnam, Cambodia, Cuba, and Israel.[95]

A fourth committee was established in 1967. As conflicts throughout the world, including Vietnam, waned, cooperation among the various States was increasing. In this improved atmosphere the committee began to make headway. A general consensus had been reached that a definition was required, and that the discretion to determine whether

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[92] *Id.* at 1-2.

[93] *Id.* at 4.

[94] *Id.* at 5.

[95] *Id.* at 9-13.

aggression had occurred should be left to the Security Council. Many of the specifics of the definition were also resolved. There was general agreement on a preamble and a generic definition, as well as a list of nonexclusive enumerated acts that would constitute aggression.[96]

After another year of work, the thirty-five nations represented on the Special Committee had a draft ready to present to the U.N. General Assembly.[97] The proposed definition was set out as follows:

> Article 1: Aggression is the use of armed forces by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.
>
> Article 2: The first use of armed force by a State in contravention of the Charter shall constitute prime facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity.
>
> Article 3: Any of the following acts, regardless of the declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;

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[96] *Id.* at 9-13.

[97] *Id.* at 13.

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4: The acts enumerated above are not exhaustive and the Security Council may determine the other acts constitute aggression under the provisions of the Charter.

Article 5: No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility. No territorial acquisition or special advantage resulting from aggression are or shall be recognized as lawful.

Article 6: Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter including its provisions concerning cases in which the use of force is lawful.

Article 7: Nothing in this definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8: In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.[98]

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[98] Report of the Working Group and Consideration of that Report by the Special Committee, 29th Sess., Supp.

The Special Committee presented its definition to the full General Assembly in 1974, twenty-two years after the United Nations had first established a committee to define aggression. Even then the definition was not without its detractors. Rather than risk having their definition voted down, the Committee offered it as part of a resolution simply recommending that the Security Council use the definition as guidance in making its determinations regarding aggression as provided in Article 39 of the Charter of the United Nations. The resolution was adopted without a vote as Resolution 3314 (XXIX).[99]

C. The International Criminal Court

1. The International Law Commission

The International Law Commission had been set up by the United Nations shortly after the United Nations was established.[100] One of the tasks assigned to the Commission was drafting a code of offenses for a permanent international criminal court. The Commission made very little headway with respect to the crime of aggression, and Cold War realities

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19, U.N. Doc. A/AC.134/L.46 (1974).

[99] 2 FERENCZ, DEFINING AGGRESSION, *supra* note 88, at 49-50; *See also* M. Cherif Bassiouni, *From Versailles To Rwanda In Seventy-Five Years: The Need To Establish A Permanent International Court*, 10 HARV. HUM. RTS. J. 11, 54 (1997). Many writers refer to Resolution 3314 as the one definition that has received universal approval. However, in light of the manner in which the General Assembly "adopted" the definition, it cannot truly be considered a universally accepted definition. It does represent the closest thing to a consensus definition that has been developed. Unfortunately for our purposes, it was drafted primarily in light of political concerns and with respect to the actions of States, not as a criminal definition suitable for the prosecution of an individual. 2 FERENCZ, DEFINING AGGRESSION, *supra* note 88, at 49-50. *But see* Benjamin B. Ferencz, *Can Aggression be Deterred by Law?*, 11 PACE INT'L L. REV. 341, 355 (1999) [hereinafter Ferencz, *Can Aggression be Deterred by Law?*] ("The definition of aggression [in Resolution 3314] was intended as a definition of the crime of aggression!"); Dawson, *supra* note 74, at 435-36.

[100]Dawson, *supra* note 74, at 414.

stymied any further efforts until 1989.[101] The Berlin Wall came down and the relationship between the United States and Russia began to improve. Optimism for the possibility of the establishing a permanent international criminal court also increased. Work began in earnest to complete a draft statute that would establish a permanent international criminal court and define the crime of aggression. [102]

The International Law Commission took the lead in drafting a statute for the international criminal court. Yet after nearly forty years of work, the draft provisions presented in 1994 did no more than implicate a general crime of aggression under customary international law. The provision left it to the Security Council to determine whether aggression had occurred.[103] By 1996 the Commission had made some progress and presented three proposed alternative definitions of aggression.

> Option A
> 1. Aggression means an act committed by an individual who, as a leader or organizer, is involved in the use of armed force by a State against the territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.
> 2. The definition covers specific acts of aggression, such as armed invasions or attacks, military occupation or annexations, military bombardments, blockades, use of forces by one State that are stationed in another State by agreement and in violation of the agreement, allowing a State to use and territory to commit an act of aggression against a third State, and one State's sending of an official or mercenary troops against another State.

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[101] *Id.* at 415.

[102] Sadat & Carden, *supra* note 72, at 439.

[103] Linda Jane Springrose, *Aggression as a Core Crime in the Rome Statute Establishing an International Criminal Court*, 1999 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 151, 164 (1999).

Option B
1. The crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in the State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate that State's sovereignty, territorial integrity or political independence.
2. Crimes against Peace, namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

Option C
1. Aggression means the use of force or the threat of use of force [by a State] against the sovereignty, territorial integrity or political independence of [another] State, or the use of force or threat of use of force in any other manner inconsistent with the Charter of the United Nations and customary international law.
2. The crime of aggression is committed by an individual who as a leader or organizer plans, commits, or orders the commission of an act of aggression.[104]

2. The Rome Conference

In June 1998, representatives from approximately one hundred-fifty States gathered in Rome, Italy, to establish a permanent international criminal court. The International Law Commission presented the conference with three alternative definitions that had been expanded from their 1996 version by the addition of several alternatives within each option. Option 1 focused primarily on planning, preparing, ordering, initiating, or carrying out an aggressive act. Option 2 defined aggression as invasion, attack, bombardment or the use of weapons against the territory of another State, the blockade of the ports another State, or the use of armed bands against another State of such gravity as to amount to one of the above

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[104] Summary of the Proceedings of the Preparatory Committee During the Period Mar. 25 – Apr. 12 1996, U.N. GAOR, 51st Sess., Supp. No. 22A, at 12, U.N. Doc. A/AC.249/1 (1996); Springrose, *supra* note 103, at 164.

listed acts. Option 3 relied on a determination by the Security Council that State aggression had occurred and then defined individual liability for those who initiated, carried out, planned, prepared, or ordered the aggression.[105]

The United States and several other nations struggled with the three proposals but failed to reach a consensus. Seeing that no agreement could be reached within the time constraints of the Conference, the United States argued that the crime of aggression should be omitted from the treaty. The German delegation instead pushed to include the crime of aggression in the treaty but leave it undefined until a consensus definition could be reached.[106] To the surprise of the American delegation, the German plan was accepted.[107] Aggression was included as a crime in Article 5 of the Rome Statute of the International Criminal Court (Rome Statute), subject to adoption of a definition and the conditions necessary for the exercise of jurisdiction.[108] The earliest these amendments can be made is seven years after the Rome Statute enters into force.[109]

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[105] Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 53rd Sess., at 12-14, U.N. Doc A/CONF.183/2/Add.1 (1998); Springrose, *supra* note 103, at 165-166.

[106] Sadat & Carden, *supra* note 72, at 437.

[107] David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT'L. L. 12, 21 (1999) [hereinafter Scheffer, *Developments*].

[108] Rome Statute Of the International Criminal Court, art. 5, U.N. Doc. A/Conf.183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998), *reprinted in* 37 I.L.M. 998 (1998) [hereinafter Rome Statute]; *see also* Scheffer, *Developments*, *supra* note 107, at 21.

[109] Rome Statute, *supra* note 108, art. 121. Given the difficulty experienced in past attempts to define the crime of aggression, there is no reason to assume that the Preparatory Commission will be successful in just seven years when so many others have failed. However, if the United States fails to ratify the treaty it will have no real influence over how the definition of aggression is developed. Without the objections of the United States, those countries that have ratified the treaty may find it much easier to reach a consensus. If so, it would likely

On July 17, 1998, the treaty known as the Rome Statute was adopted.[110] At the request of the United States the final vote on the treaty was not recorded, but the count was 120 to 7, with 21 abstentions.[111] The Rome Statute will take effect on the first day of the month after the 60th day following the date that 60 nations have ratified it.[112] President Clinton signed the Rome Statute on the last day that signatures were accepted, but the United States has not yet ratified it. As of March 24, 2002, fifty-six nations have ratified the Rome Statute.[113] The necessary sixty ratifications could very well be received before the end of 2002.

It is particularly significant that the International Criminal Court will soon be a reality because this treaty has a rather unique jurisdictional scheme. The International Criminal Court will have jurisdiction not just over the citizens of those States that have ratified the Rome Statute, but also over citizens of States that have not ratified the treaty in certain

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be a definition of aggression that in the view of the United States would "call into question any use of military force or even economic sanctions." *See* Scheffer, *supra* note 107, at 21; Bassiouni, *The International Criminal Court*, *supra* note 27, at 65.

[110] Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH J. INT'L L. 337, 352-354 (1999).

[111] Sadat & Carden, *supra* note 72, at 383. The United States has acknowledged that it voted against the Rome Statute, and most authorities name China, India, Iraq, Israel, Libya, Qatar, and Yemen as the most likely candidates to have joined the United States in opposing it. *Id.* At first blush it would appear that the United States was in the company of rather strange bedfellows in its objections to the Rome Statute. However, that is not necessarily the case. The United States voted against the Rome Statute primarily because of fears the International Criminal Court as currently conceived would inhibit its ability to engage in self-defense, peacekeeping, and humanitarian missions. *See* Scheffer, *supra* note 107, at 21. Many of the other countries that joined the United States in opposing the Rome Statute most likely did so because they were afraid it would inhibit their aggressive and expansionist policies or would take the other side in ongoing conflicts in which they are involved. There are those, of course, who fail to recognize any distinction between the motives of the United States and the other objectors.

[112] Rome Statute, *supra* note 108, art. 126.

[113] United Nations, *International Criminal Court*, *at* http://www.un.org/law/icc/index.html (last visited 24 Mar. 2002).

circumstances.[114] For the United States, this potentially means American leaders and military members could be subject to the Court's jurisdiction even if the United States never ratifies the treaty.[115]

3. The Preparatory Commission

Once the Rome Statute was adopted, a Preparatory Commission was established to draft rules of procedure for the court and to negotiate an acceptable definition of the crime of aggression. Already the Preparatory Commission has gone through eight refinements of the three alternatives for the crime of aggression presented at Rome. The latest version from the eighth session of the Preparatory Commission[116] the following options with several variations and separate conditions for the exercise of jurisdiction:

> Option 1
> 1. For the purposes of the present Statute, [and subject to a determination by the Security Council regarding the act of a State,] the crime of aggression means [the use of the armed forces, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action of a State, against the sovereignty, territorial integrity or political independence of a State in violation of the Charter of the United Nations.] any of the following acts committed by [an individual] [a person] who is in a position of exercising control or capable of directing the political or military action of a State:
> (a) initiating, or
> (b) carrying out

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[114] Dawson, *supra* note 74, at 416.

[115] Scheffer, *supra* note 107, at 18. *But see* David, *supra* note 110, at 369-71.

[116] Proceedings of the Preparatory Commission at its Eighth Session (24 Sept.-5 Oct. 2001), U.N. Doc PCNICC/2001/L.3/Rev.1 (2001).

Variation 1

[an armed attack] [the use of armed force] [a war of aggression] [war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] against another State [against another State, or depriving other peoples of their rights to self-determination], in [manifest] contravention of the Charter of the United Nations, to violate [to threaten or to violate] the [sovereignty,] territorial integrity or political independence of that State [or the inalienable rights of those people] [except when this is required by the principle of equal rights and self-determination of peoples and the rights of individual or collective self-defence].

Variation 2

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.

Variation 3

Add the following paragraph to paragraph 1, variation 1, above:

2. Provided that the acts concerned or their consequences are of sufficient gravity, [acts constituting aggression include] [the use of the armed force includes] [are] the following [whether preceded by a declaration of war or not]:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade [of the ports or coasts] of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial

involvement therein.
3. When an attack [the use of armed force] under paragraph 1 has been committed, the (a) planning (b) preparing, or (c) ordering thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.

Option 2
For the purposes of the present Statute and subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating or carrying out a war of aggression.

Conditions for the exercise of jurisdiction
Option 1
1. The Court shall exercise its jurisdiction with regard to the crime of aggression in accordance with the provisions of Article 13 of the statute.
2. The Security Council shall determine the existence of an act of aggression perpetrated by the State whose national is concerned in accordance with the relevant provisions of the Charter of the United Nations before proceedings take place in the Court with regard to the crime of aggression.
3. The Security Council, acting in accordance with Article 13 (b) of the Statute of the International Criminal Court, shall first make a decision establishing that an act of aggression has been committed by the State whose national is concerned.
4. The Court, upon receipt of a complaint relating to the crime of aggression under Article 13 (a) or (c), shall, with due regard to the provisions of Chapter VII of the Charter of the United Nations, first request the Security Council to determine whether or not an act of aggression has been committed by the State whose national is concerned.
5. The Security Council shall make a decision upon this request within [6] [12] months.
6. Notification of this decision shall be made by letter from the President of the Security Council to the President of the International Criminal Court without delay.

Variation 1
7. In the absence of a decision of the Security Council within the time frame referred to in paragraph 5 above, the Court may proceed.
8. The decision of the Security Council under paragraph 5 above shall not be interpreted as in any way affecting the independence of the Court in the exercise of its jurisdiction with regard to the crime of aggression.

Variation 2
7. Notwithstanding the provisions of paragraph 2 above, in the absence of a

decision by the Security Council within the time frame referred to in paragraph 5 above, the Court shall, with due regard to the provisions of Articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make a recommendation.
8. The General Assembly shall make such a recommendation within [12] months.
9. Notification of this recommendation shall be made by letter from the President of the General Assembly to the President of the International Criminal Court without delay.
10. In the absence of such a recommendation within the time frame referred to and paragraph 8 above, the Court may proceed.
11. The decision of the Security Council under paragraph 5 above or the recommendation of the General Assembly under paragraph 8 above shall not be interpreted as in any way affecting the independence of the Court in the exercise of its jurisdiction with regard to the crime of aggression.

Option 2
1. The Court shall exercise its jurisdiction with regard to the crime of aggression subject to a determination by the Security Council, in accordance with Article 39 of the Charter, that an act of aggression has been committed by the State concerned.
2. When a complaint related to the crime of aggression has been lodged, the Court shall first seek to discover whether a determination has been made by the Security Council with regard to the alleged aggression by the State concerned, and if not, it will request, subject to provisions of the Statute, the Security Council to proceed to such a determination.
3. If the Security Council does not make such a determination or does not make use of Article 16 of the Statute within 12 months of the request, the Court shall proceed with the case in question.

Option 3 (Option 3 is duplicated and appears also under the definition of the crime of aggression since it covers the two issues, namely, the definition of the crime and conditions for the exercise of jurisdiction.)
For the purposes of the present Statute and subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating or carrying out a war of aggression.[117]

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[117] *Id.* at 13.

III. Aggression and the International Criminal Court: An Analysis of the Pros and Cons

A. The American Objections

> *It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize.*[118]

The adoption of the Rome Statute was in many ways a humiliating defeat for the United States as several American concerns were simply brushed aside.[119] Ambassador David J. Scheffer, United States Ambassador-at-Large for War Crime Issues and the head of the American delegation to the Rome Conference, summed up the most serious American objections to the Rome Statute.[120] With respect to the crime of aggression, Ambassador Scheffer noted the United States was surprised to find the crime of aggression included at all in the final draft of the Rome Statute. The position of the United States was that it should have been removed from final draft since no consensus definition could be reached.[121]

The United States considered it unfair to include the crime of aggression in the statute without a definition. To do so left the determination of an ultimate definition of the crime of

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[118] Scheffer, *supra* note 107, at 18.

[119] Sadat & Carden, *supra* note 72, at 448.

[120] *See also* Cara Levy Rodriquez, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT'L L. REV. 805 (1999).

[121] Scheffer, *supra* note 107, at 21.

aggression only to those States that become parties to the Rome Statute. Depending on how the definition is to be drafted, Ambassador Scheffer indicated it could "call into question any use of military force or even economic sanctions." This alone could be enough to prevent the United States from ever ratifying the treaty.[122]

The United States was also very concerned that the Rome Statute did not require a finding of State aggression by the Security Council as a prerequisite to a prosecution for the crime of aggression. The view of the United States is that Article 39 of the Charter of the United Nations provides the sole mechanism for a finding of State aggression.[123]

The United States also objected to the "independent prosecutor" provision of the Rome Statute. Article 15 of the Rome Statute gives the Prosecutor the power to initiate investigations on his own even without a referral from the Security Council or another State. The Prosecutor's power is only limited by the requirement to submit a request to the Pre-Trial Chamber of the Court for permission to commence an official investigation. A majority of the three judges of the Pre-Trial chamber must concur before the official investigation can proceed. This does not prevent the Prosecutor from conducting a preliminary investigation into a matter. Nor does it prevent the Prosecutor from continuing the "preliminary" investigation if the Pre-Trial Chamber denies permission to commence an official investigation since there is no limit on the number of times a Prosecutor can present a matter to the Pre-Trial Chamber. Thus, there is nothing in the procedural rules of the Rome Statute

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[122] *Id.* at 21.

[123] *Id.* at 14-21.

to dissuade a stubborn or a politically motivated Prosecutor from keeping an issue alive indefinitely by repeatedly bringing the issue to the Pre-Trial Chamber.[124]

Finally, it is difficult to conceive of a forum that would better serve the public relations needs of the world's rogue nations. The International Criminal Court presents a unique forum they can easily use to distract the United States and its allies at no cost to themselves. These rogue nations will not be contributing to the cost of supporting the International Criminal Court; and they are unlikely to be brought before it. After all, having jurisdiction over an offense is one thing, getting custody of the accused is quite another.[125] Nothing in the Rome Statute will resolve this fundamental problem.

The United States had other objections as well. Ambassador Scheffer noted the United States objected to the Rome Statute's form of jurisdiction over non-party States, the lack of a ten-year opt-out clause regarding crimes against humanity and war crimes, that terrorism and drug crimes could be included in the Court's jurisdiction in the future, and that the Rome Statute permitted no reservations.[126]

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[124] Rome Statute, *supra* note 108,arts. 15, 39, 57. A close examination of the discretion the Rome Statute leaves to the Prosecutor gives ample cause for concern that at some point this discretion will be abused. The most likely target of that abuse is the United States. *See also* Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court,* 167 MIL. L. REV. 20, 63-66 (2001); Rodriguez, *supra* note 120, at 833-34.

[125] One need only look as far as Iraq to see that although Saddam Hussein has committed numerous war crimes of immense seriousness, he remains beyond the reach of any court as long as he remains in Iraq. The same can be said for the many defendants who have been indicted by the International Criminal Tribunal for the Former Yugoslavia but have still not been apprehended.

[126] Sadat & Carden, *supra* note 72, at 448-449. *See also* Scheffer, *supra* note 107, at 17-21.

In the United States Senate, Senator Jesse Helms, chairman of the powerful Foreign Relations Committee, has been one of the most outspoken critics of the International Criminal Court.[127] Senator Helms indicated the treaty would be "dead on arrival" at his committee even before the Rome Conference.[128] Both before and after President Clinton signed the treaty, Senator Helms made it clear that he not only opposed the treaty, but he actively opposed even the idea of an International Criminal Court.[129] Senator Helms has since announced that he will not seek reelection after his current term ends at the 2002 adjournment of the 107th Congress.[130] The absence of Senator Helms may improve prospects for the Rome Statute in the Senate, but there is no indication that his absence alone will ensure ratification.

B. Criticism Of The American Position

> *My advice is blunt: Get over it. The world is changing. The International Criminal Court will be established, soon. We have to decide whether we stand for the rule of law or squirm in the face of it. If we cannot stand for the proposition that heinous crimes against humankind will be answered and build the institutions to do that job in a very complex world, then our leadership in promoting the rule of law abroad will decline rapidly and the value of our own principles will erode. Others will take the lead. The United States must have the courage to embrace change if it presumes to retain the mantle of leadership. The last decade was the beginning of an age of accountability that the United States must continue to lead, both in the*

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[127] Henry T. King & Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47, 79 (1999).

[128] *Id.* at 81.

[129] *Id.* at 80-81.

[130] CNN, *Helms Say He Won't Seek Re-election* (Aug. 23, 2001), *available at* http://www.cnn.com/2001/ALLPOLITICS/08/22/jhelms.

interests of humanity and to ensure that justice is rendered fairly and globally in a manner that advances U.S. interests.[131]

Criticism of the American stance with regard to the International Criminal Court has poured in from all directions.[132] In some cases the negotiating position of the United States simply invited ridicule.[133]

A vocal contingent of States, most of whom contribute little or nothing toward maintaining international peace and security, sought to set up the International Criminal Court in a manner that would insulate it from the political intrigues of the Security Council. They wanted a truly independent judiciary. These States felt requiring a Security Council finding of State aggression as a prerequisite to charging an individual with the crime of aggression would "needlessly undermine the Court's authority and would reinforce the perception that the members of the Security Council, especially the permanent members, are

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[131] David J. Scheffer, *A Negotiator's Perspective on the International Criminal Court, The Fourteenth Waldemar A. Solf Lecture in International Law*, 167 MIL. L. REV. 1, 6 (2001) [hereinafter Scheffer, *A Negotiator's Perspective*] (delivered Feb. 28, 2001).

[132] *See* Michael A. Barrett, *Ratify or Reject: Examining the United States' Opposition to the International Criminal Court*, 28 GA. J. INT'L & COMP. L. 83 (1999); King & Theofrastous, *supra* note 127; Sadat & Carden, *supra* note 72; Michael D. Mysak, *Judging the Giant: An Examination of American Opposition to the Rome Statute of the International Criminal Court*, 63 SASK. L. REV. 275 (2000); John F. Murphy, *The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*, 34 INT'L LAW. 45 (2000); Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J .INT'L. L. 124 (2001).

[133] The United States repeatedly sought exclusive immunity for U.S. forces. This type of "the rules apply to everyone but the United States" did not play well among the Rome delegates. *See* Scheffer, *A Negotiator's Perspective, supra* note 131, at 8.

unaccountable for their actions, while the rest of the world must struggle to meet established standards of conduct."[134]

Others pointed to the extensive safeguards built into the Rome Statute to prevent any abuse of prosecutorial discretion such as the requirement for Pre-Trial Chamber approval of anything more than a preliminary investigation and the complementary jurisdictional scheme.[135] The unique complementarity jurisdictional scheme of the Rome Statute was developed to give a State the primary right to investigate and prosecute a case regarding its own citizen in most instances.[136] Except for those cases referred by the Security Council, the International Criminal Court would, in theory, defer investigation and prosecution unless the State is "unwilling or unable to genuinely" investigate and prosecute the alleged offense.[137] Unwillingness is determined by whether the Court finds the State action "was made for the purpose of shielding the person concerned from criminal responsibility," has been unjustifiably delayed, or is "not being conducted independently or impartially ... with an intent to bring the person concerned to justice."[138] Inability is determined by whether the Court finds the "State is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings."[139] This method of

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[134] Sadat & Carden, *supra* note 72, at 443.

[135] Springrose, *supra* note 103, at 168-170; Rome Statute, *supra* note 104, arts. 15,16,17,53, 57.

[136] Newton, *supra* note 124, at 26. Although not particularly clear from a cursory reading of the Rome Statute, in those cases referred to the Court by the Security Council the State's right to investigate and prosecute is usurped and the complementary provisions do not apply. *Id.* at 49.

[137] Rome Statute, *supra* note 108, art. 17(1). *See also* Newton, *supra* note 124, at 53-54.

[138] Rome Statute, *supra* note 108, art. 17(2). *See also* Newton, *supra* note 124, at 58.

[139] Rome Statute, *supra* note 108, art. 17(3). *See also* Newton, *supra* note 124, at 61.

complementary jurisdiction is intended to protect the Court from politically motivated abuses.[140]

Writers also pointed to a number of other protections built into the Rome Statute that are intended to prevent abuses by the Prosecutor. For example, the Prosecutor must give prior notice to the State of nationality before attempting to exercise jurisdiction over an individual. The Pretrial Chamber controls initiation of official investigations, prosecutions, and the issuance of legal process. There is a "sufficient gravity" threshold for offenses that sets a high standard before the Court has jurisdiction over an offense. A decision to disregard a State's investigation or prosecution requires approval of the Pretrial Chamber and is reviewable by the Appeals Chamber. The Security Council can suspend action on a case for up to twelve months. Finally, if the United States does not ratify the treaty and become a party to the treaty, it will have no legal responsibility to cooperate with the Court and could simply refuse to turn the individual over to the Court.[141]

These protections are, of course, only theoretical. "Complementarity, like so much else associated with the International Criminal Court is simply an assertion, utterly unproven and untested. Since no one has any actual experience with the Court, of course, no one can say with any certainty what will happen."[142] Moreover, all these protections may be somewhat

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[140] The considerable subjectivity in the complementarity provision, perhaps caused by the hasty approval process, leaves ample room for manipulation. *See* Newton, *supra* note 124, at 72-73.

[141] Leigh, *supra* note 132, at 129-30; David, *supra* note 110, at 369.

[142] David, *supra* note 110, at 369 (quoting *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. On International Operations of the S. Comm. on Foreign Relations*, 105th Cong. 63 (1998) (testimony of John Bolton)).

irrelevant because the most powerful tool the Prosecutor has may be the power to convict a State in the press.[143] None of the named protection will protect a State from an unethical Prosecutor who decides to try his case in the press.

Certainly all of the objections put forth by the United States are "worst case" scenarios that may never occur, and in fact should not occur if the individuals appointed to the Court act professionally and wisely.[144] However, the United States, which is undoubtedly the most litigious society in the world, has seen first hand that even the most regulated and well-intentioned legal regimes can be abused. There will likely be strong opposition to ratifying the Rome Statute unless those fears can be allayed.

IV. An Analysis of the Current Proposal for the Crime of Aggression

A. Does the International Criminal Court Really Need a Crime of Aggression?

> *[S]cholars estimate that over one hundred seventy million non-combatants have been killed in episodes of mass killings in the twentieth century. A further forty million combatants have died in conflicts. That is a total of over two hundred and ten million people, or one in every twenty-five persons alive today—truly a figure that defies the imagination.*[145]

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[143] Leigh, *supra* note 132, at 129.

[144] *See* Ferencz, *Can Aggression be Deterred by Law?*, supra note 99, at 357-58.

[145] Judge Gabrielle Kirk McDonald, *The Changing Nature of the Law of War, The Eleventh Annual Waldemar A. Solf Lecture*, 156 MIL. L. REV. 30, 34 (1998) (delivered Feb. 9, 1998).

[A]ggression is simply too ambiguous a concept to serve as the basis for criminal prosecution.[146]

No reasonable person is likely to dispute that the twentieth century was a bloody one, or that the prospects for the twenty-first century do not appear to be much better. But it does not necessarily follow that giving the International Criminal Court jurisdiction over the crime of aggression is the answer.[147] In fact, the crime of aggression was likely responsible for only a very small portion of those killed in the twentieth century. The vast majority of those who committed these crimes, if not all of them, could just as easily be prosecuted for another crime such as genocide or a crime against humanity.

Still, the ability to prosecute aggression in a permanently established judicial system is intuitively attractive.[148] It avoids the necessity of establishing ad hoc tribunals for each conflict and the inherent inefficiency and expense that comes from creating a tribunal from scratch each time. It would, in theory, provide permanent deterrence to State leaders and all others who may be inclined to commit war crimes.

Despite this intuitive attractiveness, the theoretical deterrent value of the International Criminal Court with jurisdiction to prosecute aggression has never been proven. There does not appear to be any evidence that in reality the threat of prosecution has been an effective

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[146] Murphy, *supra* note 132, at 73.

[147] Some doubt whether the International Criminal Court is likely to provide any real deterrence. *See* Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156 (2001).

[148] *See* Dawson, *supra* note 74, at 446-47).

deterrent to aggression.[149] In fact, history demonstrates just the opposite. State leaders in Germany and Japan were repeatedly warned that they would face prosecution for war crimes, yet the atrocities continued.[150] More recently, the United States repeatedly warned Slobodan Milosevic and other Yugoslavian leaders that they faced prosecution for war crimes, yet once again it apparently had little or no effect.[151]

Some may argue that past warnings to a State leader that he would be prosecuted were ineffective because there was no permanent institution like the International Criminal Court with jurisdiction over the offenses or that prosecution in the past has been too random to provide a real deterrent. The more likely explanation is that those who commit war crimes, particularly the crime of aggression, have already moved beyond the point where their behavior can be shaped by the rule of law. They have convinced themselves that they are beyond the reach of the law or that the law simply does not apply to them. The existence of the International Criminal Court and the crime of aggression is likely to have little affect on their conduct.

Since including the crime of aggression in the International Criminal Court is not likely to have a significant deterrent effect, one must question whether its inclusion is worth

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[149] *See* Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203, 214-16 (1998); Adam Roberts, *The Law of War: Problem of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 27 (1995).

[150] Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 173 (2000).

[151] Guy Roberts, *Assault on Sovereignty: The Clear and Present Danger of the International Criminal Court*, 17 AM. U. INT'L L. REV. 35, 41 (2001).

alienating the United States. The International Criminal Court can survive and flourish without the crime of aggression. It will likely be doomed without the support of the United States.

If aggression is included in the Rome Statute in a manner that causes the United States to restrict its humanitarian missions or if its processes are abused to the detriment of the United States, an even more tragic result may be that the United States will be less likely to intervene to prevent the slaughter of innocent men, women, and children.[152] If this occurs those humanitarians who are pushing to include the crime of aggression in the Rome Statute may well win that battle but lose the war to prevent innocent deaths.

For the United States, it is imperative that it engages the International Criminal Court to the extent possible to shape the crime of aggression in a way that will not restrict necessary humanitarian interventions and the right of self-defense. As Ambassador Scheffer admonished, it is time to get over the frustrations of the Rome Conference because the International Criminal Court will be a reality, sooner rather than later. The United States must find a way to deal with the fact that the Rome Statute will soon be in effect.[153]

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[152] The delegates at the Rome Conference obviously felt that it was more important to get any statute adopted, whether it was adequately drafted and analyzed or not. In their haste to do so they "elevated principle above practicality." The result is deeply flawed, perhaps fatally so, and if it stifles the willingness of States to take military action it may have just the opposite of the effect that was intended. *See* Newton, *supra* note 124, at 23-24; Smidt, *supra* note 147, at 222-40; Rodriquez, *supra* note 120, at 831-32; Scheffer, *A Negotiator's Perspective*, *supra* note 131. *But see* Ferencz, *Can Aggression be Deterred by Law?*, *supra* note 99.

[153] Scheffer, *A Negotiator's Perspective*, *supra* note 131, at 6.

B. The Proper Role of the Security Council

> *[T]he Charter provisions giving only five nations special veto rights are manifestly unfair, but they were accepted for vital political reasons without which the U.N. probably would not have come into existence. The time may come when privileged members will recognize the value of voluntarily restraining their unjust veto power, but the Rome Statute cannot diminish the Council's authority nor its Charter obligation to determine when aggression by a State has occurred.*[154]

The first issue that must be addressed, and perhaps the most contentious one, is the appropriate role of the Security Council. Article 5(2) of the Rome Statute provides that jurisdiction over the crime of aggression must "be consistent with the relevant provisions of the Charter of the United Nations." Article 39 of the Charter of the United Nations states very clearly that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression." Taken together, most states, particularly the United States and the other four permanent members of the Security Council, interpret this to mean a finding of State aggression by the Security Council is a prerequisite to prosecuting an individual from that State for the crime of aggression.[155]

Other States prefer a system for prosecuting the crime of aggression that is not dependent on action by the Security Council.[156] They point to the past record of the Security Council,

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[154] Ferencz, *Can Aggression be Deterred by Law?*, *supra* note 99, at 355-56.

[155] Scheffer, *Developments*, *supra* note 107, at 13. *See also* Mahnoush H. Arsanjani, *Developments in International Criminal Law: The Rome Statute of the International Criminal Court*, 93 Am. J. Int'l. L. 22, 30 (1999); Sadat & Carden, *supra* note 72, at 443; THE INTERNATIONAL CRIMINAL COURT 144-45 (Roy S. Lee ed., 1999).

[156] Sadat & Carden, *supra* note 72, at 443; Arsanjani, *supra* note 155, at 30.

particularly during the Cold War, to illustrate their point that the Security Council is often unable to take any action at all when the veto power of the five permanent members leads to a stalemate on controversial issues.[157] Moreover, they contend that requiring a Security Council finding of State aggression as a prerequisite to prosecution of an individual is unfair because, with their veto power, the permanent members will be immune from ever being prosecuted for aggression. In their opinion true justice can only be served by a judiciary that is truly independent, particularly with respect to making its own finding of aggression.[158]

There is little room for compromise between these two positions. The independent judiciary argument is certainly intellectually appealing. However, Article 5 of the Rome Statute, adopted by one hundred-twenty states, makes it clear that the manner in which the International Criminal Court handles the crime of aggression must be consistent with the Charter of the United Nations. It is difficult to imagine that this language was intended to do anything other than require a Security Council finding of State aggression as a prerequisite to prosecuting an individual for the crime of aggression. Any other result would be contrary to Article 2(4) of the Charter of the United Nations, which designates the Security Council as the sole body with authority to determine whether aggression has occurred. This principle is "basic to the security regime established by the Charter and fifty-six years of State practice."[159] The parties to the Rome Statute are also members of the United Nations, and

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[157] *See* Springrose, *supra* note 103, at 173.

[158] Sadat & Carden, *supra* note 72, at 443-44.

[159] United States of America, Statement in the Working Group on the Crime of Aggression (Sept. 26, 2001) (on file with the author), *available at* http://www.isc-icc.org/Usaggression.html. *But see* Dawson, *supra* note 74, at 440-41.

they are bound by its terms. A treaty such as the Rome Statute cannot amend the Charter of the United Nations.[160]

This may be an inefficient and unfair system, and it may not work in some cases. But it is probably the best that can be accomplished. In reality, it may not be a bad thing. Full Security Council backing will almost certainly be necessary to successfully confront State aggression. It was necessary during the Gulf War,[161] and it was necessary for the initiation of the recent war on terrorism. It would likely be extremely difficult for any State, even the United States, to unilaterally use significant military action to stop an act of aggression without the support of a substantial coalition of States and most likely the backing of the Security Council.

Any attempt to prosecute the crime aggression in a divided and highly politicized atmosphere at the Security Council would do more harm than good. The International Criminal Court would likely lose credibility, and therefore the cooperation and funding it needs to operate.[162] It follows that the crime of aggression is such a political concept that near unanimity is required before a successful prosecution can even begin. Requiring the Security Council to make a finding of State aggression as a prerequisite merely recognizes that reality.

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[160] Ferencz, *Can Aggression be Deterred by Law?*, *supra* note 99, at 355.

[161] The Security Council squandered the opportunity to declare Iraq an aggressor after its invasion of Kuwait. Instead, the Council relied on the principle of collective self-defense. Dawson, *supra* note 74, at 428.

[162] *See* Scheffer, *A Negotiator's Perspective*, *supra* note 131, at 10.

C. Is There any Customary Law or Consensus Definition of Aggression?

The obvious prerequisite to individual liability for the crime of aggression is an act of State aggression. The United States has consistently complained that the Rome Statute, like all other treaties, must comport with customary international law.[163] The United States argues that international law should be advanced in the traditional manner by consistent State action taken because of a perceived obligation.[164] The United States position is that the scope of aggression should not be expanded to "criminalized deeds that were not already sanctioned by customary international law, were not generally followed by the practice of States, and were not included as violation under any domestic legislation.[165]

Most States would agree that the prohibition against aggression has reached the level of *jus cogens*.[166] Unfortunately, despite years of attempts to construct a suitable definition setting out the scope of aggression, there has been no real progress beyond what is contained in Article 39 of the Charter of the United Nations, the few treaties that have been adopted, and General Assembly Resolution 3314,[167] all of which relate to State action.

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[163] Scheffer, *Developments*, *supra* note 107, at 17.

[164] David, *supra* note 110, at 405.

[165] Benjamin B. Ferencz, *Deterring Aggression by Law—A Compromise Proposal* (Jan. 11, 2001) [hereinafter Ferencz, *Deterring Aggression by Law*] (on file with the author), *available at* http://benferencz.org/defined.html.

[166] David, *supra* note 110, at 359.

[167] *See infra.* Part II.

Article 39 breaks down the use of armed force into several categories: a threat to the peace, breach of the peace, and aggression. Thus, aggression is by definition a use of force that does more than create a breach of peace. With respect to a definition for individual criminal liability for aggression, the definitions used in the war crimes trials, such as they were, represent the only example of State practice with regard to a definition that was oriented toward criminal prosecution of individuals. Resolution 3314 may also provide some guidance, depending on how its purpose and precedential value is viewed given that it was adopted without a vote.[168] In both the Nuremberg trials and those held in Far East, the crime against peace, rather than aggression, was defined essentially as: planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or entering into a conspiracy to commit any of the above. To go further would, in the view of the United States, be to move beyond the customary international law definition of the crime of aggression.[169]

Any of the options now before the Preparatory Commission[170] can provide a Security Council finding of State aggression as a prerequisite to prosecution and limit the definition of aggression to what the United States considers customary international law, namely planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or entering into a conspiracy to commit any of the above. In Option 1, Variation 1 would add the right to use force to obtain equal rights and self-

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[168] *See supra* text accompanying note 99.

[169] Ferencz, *Deterring Aggression by Law*, *supra* note 165.

[170] *See infra.* Part II.C.3.

determination, an issue whose determination would invariably become so complicated it would be unworkable. Variation 2 substantially conforms to the United States view, but includes an element of State intent to establish a military occupation or annexation.

Variation 3 adds the list of prohibited acts that goes well beyond the simple definition of aggression acceptable to the United States. The addition of the list of prohibited acts greatly complicates and expands the potential effect of the definition. It certainly gives more precise guidance regarding the types of acts considered to be aggression, which would address the due process concerns inherent in a general definition. It also provides a threshold that jurisdiction attaches only if the acts are "of sufficient gravity." However, it is exactly the type of definition the United States fears would restrict its right to pursue humanitarian missions and act in self-defense and is sure to be vigorously opposed by the United States. This type of definition would likely prevent United States ratification of the Rome Statute.

Option 2 is essentially the United States' view of aggression. It would likely be accepted by the United States.

Of the proposed conditions for the exercise of jurisdiction, Option 1 comports with the view of the United States that a finding of State aggression by the Security Council should be a prerequisite to prosecution. Variations 1 and 2 are attempts to overcome any Security Council deadlock by giving the Court the right to proceed on its own in certain cases. Neither the United States nor any of the other four permanent members of the Security Council are likely to support this effort to bypass their veto power. Option 2 of the proposed conditions for the exercise of jurisdiction makes a similar attempt to overcome a Security

Council deadlock by giving the Court the authority to proceed if the Security Council is deadlocked. It also is sure to be opposed by the permanent Security Council members.

D. Will a Broad Definition of Aggression Affect the United States?

> *I think I can anticipate what will constitute a crime of "aggression" in the eyes of this Court: it will be a crime when the United States of America takes any military action to defend its national interests, unless the U.S. first seeks and receives the permission of the United Nations.*[171]

An expansive definition of aggression would almost certainly cause the United States to hesitate in the use of force even in humanitarian situations. The only way to determine the extent of its chilling effect on the United States is to look at how it would apply to military actions taken in the past.

The most comprehensive and in depth look at how a crime of aggression would have applied to past military actions comes from Marcella David. David concludes that the United States would only be at risk when it "unilaterally resorts to armed force on a questionable or contested factual record, or in non-traditional responses to acts of aggression against it."[172] With regard to humanitarian interventions, he argues that the United States would be at risk only when the intervention is unilateral as opposed to a collective act. He does, however,

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[171] Smidt, *supra* note 147, at 203 (quoting *Hearing on the Creation of an International Criminal Court Before the Sub-committee on International Operations of the Committee on Foreign Relations*, 105th Cong. 60 (1998) (statement of Sen. Helms)).

[172] David, *supra* note 110, at 395.

concede that even then it may be a close question, particularly if the intervention was not sanctioned by the United Nations.[173]

Even if the United States were to agree with that assessment, it is unlikely to support a legal regime that would have that affect. The bombing of the terrorist camps in Afghanistan in 1998 were considered by many countries to be based on a questionable or contested factual record and a non-traditional response to acts of aggression against the United States. There is no doubt a complaint would have been made to the International Criminal Court, along with the attendant press coverage such events engender—exactly the intolerable type of scenario the United States has said repeatedly is the likely result if the crime of aggression is defined too broadly. In such a case the United States would be unable to defend itself in the court of public opinion, and perhaps even at the International Criminal Court without revealing sensitive information, sources and techniques that would cripple efforts to track terrorists. Yet the events of September 11 have confirmed the United States' position with respect to those training camps.

Although David opines the United States has little to fear because malicious charges would not survive the preliminary investigation,[174] the United States Senate is unlikely to be convinced. An incredible amount of damage can be done by adverse publicity even if the case is dismissed after a preliminary investigation.

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[173] *Id.* at 397-404.

[174] *Id.* at 408.

IV. Conclusion

The world has survived for centuries without a permanent court with the authority to prosecute the crime of aggression. Even if the Rome Statute enters into force in 2002, it will be at least seven more years before the statute can be amended to implement a definition and the procedures necessary to prosecute aggression. It may be that the crime of aggression is so politically divisive that a majority of the parties to the Rome Statute will never be able to reach an agreed definition. Perhaps this is not such a bad thing. If at least the major powers of the world are united in the belief that an act of aggression has occurred, the Security Council can always set up a mechanism to have the issue tried before the International Criminal Court or an ad hoc tribunal.

If aggression is to be defined for the International Criminal Court, it should be limited to its traditional scope. The Rome Statute's jurisdictional scheme that purports to allow it to have jurisdiction over citizens of States that are not parties is already questionable under the rules and practices of international law. An expansive definition of aggression would only magnify the problem.

More importantly, an expansive definition of aggression would likely stifle the exercise of legitimate military force. Care must be taken to ensure that in setting up a court to deal with the atrocities inflicted on innocent people by evil and rogue States we do not prohibit the legitimate use of force that has so often stopped genocide and limited the sacrifice of innocent lives. It will do no good to explain that the world's intentions were good if the result is to compound the misery of the unfortunate.

Perhaps it is time to end the stalemate on the crime of aggression—either agree to a definition that will win the support of the United States or drop the crime of aggression from the International Criminal Court. This single issue is likely to determine whether the United States will ultimately ratify the Rome Statute. Aggression may the "supreme international crime," but it can be dealt with outside of the International Criminal Court. It is enough that an institution is available to prosecute genocide and crimes against humanity. The participation of the United States, both financially and through its efforts to obtain custody of defendants is more important than whether the crime of aggression is included in the International Criminal Court. Those truly interested in humanitarian issues should recognize this before it is too late.

There is little doubt that the International Criminal Court will soon be a reality, and it will almost certainly perform better than the dire predictions of the United States. It is likely to complicate the exercise of United States' foreign policy, but it is unlikely to inhibit military action by the United States significantly unless an expanded crime of aggression is adopted. It is time to recognize that everyone will be better served by an International Criminal Court that can at least be made palatable to the United States.